IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-740

GULF OIL CORPORATION, ET AL.,
Petitioners,

v.

PAUL J. BOGOSIAN,
Respondent.

GULF OIL CORPORATION, ET AL.,
Petitioners,

v.

LOUIS J. PARISI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The undersigned petitioners pray that a writ of certiorari issue to review the judgment and opinion of a divided panel of the United States Court of Appeals for the Third Circuit, entered on July 21, 1977.

OPINIONS BELOW

The opinion of the court of appeals is reported at 561 F.2d 434 and is set forth in the Appendix at pages A. 1-54. The order denying petitioners' motion for rehearing and suggestion for rehearing in banc is

set forth in the Appendix at page A-56.[1] The two relevant opinions of the United States District Court for the Eastern District of Pennsylvania are reported at 62 F.R.D. 124 (1973) (class action certification) and 393 F. Supp. 1046 (1975) (summary judgment) and are set forth in the Appendix at pages A. 57-73, 76-102.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 21, 1977. A timely petition for rehearing in banc was denied on August 25, 1977, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The decision below epitomizes and significantly fosters a trend that is producing a critical breakdown in the administration of justice: the conversion of grievances (real or imagined) between two parties, however miniscule, into massive industrywide and nationwide litigation which clogs the courts and imposes astronomical litigation burdens upon the parties. Although the Federal Rules of Civil Procedure call for "the just, speedy and inexpensive determination of every action" (Rule 1) and afford procedures that might enable district courts to meet this challenge (*e.g.*, Rules 12 and 56), the panel majority dictates a procedure which is accurately described by the dissent as "jurisprudential anarchy" (A. 43).

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[1] The suggestion for rehearing in banc was considered only by the three members of the panel since all of the other judges of the court of appeals had recused themselves from participating in this case (see p. 9, *infra*).

The two plaintiffs purport to have a tie-in claim involving the leasing of a service station and the securing of a supply of the lessor's brand of gasoline for resale. Rather than having the individual claims promptly resolved, the two judge majority of the court of appeals has determined to allow plaintiffs' counsel to convert them into a mammoth proceeding against strangers to the plaintiffs that by its very magnitude would seriously impair proper functioning of the court system and would impose such enormously unfair and coercive burdens upon defendants as to deprive them of elementary justice.

The questions which warrant urgent review by this Court are:

(1) Whether the action of the court of appeals violates the Federal Rules of Civil Procedure and defendants' due process rights by depriving the district court of the power to determine that complaints, which as a matter of "deliberately employed strategy" alleged no concerted action, but only interdependent consciously parallel action, state a claim for relief under Section 1 of the Sherman Act.

(2) Whether the panel majority, in conflict with the established law of the Third Circuit and other courts of appeals, erroneously substituted its findings, based on unfounded factual assumptions and legal conclusions, for the discretionary class certification determinations of the district court.

(3) Whether the panel majority, in reversing the class determination ruling, erred in concluding that a purchaser may recover antitrust damages for an alleged illegal tying arrangement where he voluntarily obtained both the alleged tying and tied products.

STATUTES AND RULES INVOLVED

The statute involved is 15 U.S.C. § 1, which reads in pertinent part as follows:

> Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . .

The case also involves the proper interpretation of Rules 1, 12, 23 and 56 of the Federal Rules of Civil Procedure, the texts of which are set forth in the Appendix at A. 132-38.

STATEMENT OF THE CASE

The original *Bogosian* complaint was filed over six years ago in May, 1971, on behalf of a lessee service station dealer of Gulf Oil Corporation. That complaint alleged that the defendants had a monopoly of "strategically located service station sites" in metropolitan areas and used this monopoly to control virtually all aspects of the operations of independent retail service station dealers.[2] The plaintiff purported to represent a nationwide class of all past, present and future retail dealers who leased service stations from any of the defendants. The complaint, however, did not allege that Bogosian had any business dealings with any defendant other than Gulf or that any defendant had engaged in any conspiratorial or concerted action which affected the plaintiff. After Bogosian had confirmed at his deposition that his claims were based solely on his relationship with Gulf, the non-Gulf defendants moved for summary judgment.

[2] The original *Bogosian* complaint is set forth in the Appendix, at A. 124-31.

Acknowledging that he had set forth no basis for suing the non-Gulf defendants, plaintiffs' counsel met the summary judgment motion with a two-fold procedural response. First, he moved to amend the *Bogosian* complaint to allege that "defendants have conspired among themselves and with others . . . through a course of interdependent conscious parallel action pursuant to a tacit understanding by acquiescence coupled with assistance . . ." (A. 117-18).[3] Second, Bogosian's counsel filed the *Parisi* complaint on behalf of Mr. Parisi, a former lessee dealer of Exxon Corporation. That complaint named the original *Bogosian* defendants as well as two additional companies; asserted the same alleged monopoly and anticompetitive activities; purported to encompass the same class; and included the same vague "conspiracy" allegation as the amended *Bogosian* complaint.

On January 13, 1972, the district court, while noting that "conspiracy allegations were conspicuously lacking from the original complaint" and that the omission of "such important allegations" was "curious," raising the "suspicion that the omission was by design and not by inadvertence," granted Bogosian's motion for leave to amend and therefore denied defendants' motion for summary judgment without prejudice as moot (A. 103-05).

The parties then engaged in extensive discovery and briefing on the propriety of these cases proceeding as class actions. During the course of the initial hearing on the class motion in January, 1973, plaintiffs' counsel, recognizing the futility of seeking class certification on their original claims, substantially modified them. They abandoned their prior claims, including the alleged monopoly of service station sites, and stated their intention to proceed on the allegation that defendants entered into tying arrangements with their dealers by requiring each

[3] The first amended *Bogosian* complaint is set forth at A. 113-23.

dealer who leased a service station to purchase gasoline exclusively from the lessor.

On March 30, 1973, the district court again granted plaintiffs leave to file new amended complaints setting forth their new theory of liability. On May 2, 1973, two years after the beginning of this litigation, the third version of the claims was filed.[4] In addition to abandoning many of the plaintiffs' previous allegations of monopoly and other purported anticompetitive practices, the new complaints deleted the conspiracy allegations which had appeared in the *Bogosian* first amended complaint and the original *Parisi* complaint. That is, the new complaints deleted the previous allegation of "conspiracy" and "tacit understanding" among defendants, and did not allege any concerted activity, but only that:

> Defendants, through a *course of interdependent consciously parallel action*, have required all dealers who lease, sublease, or renew such leases or subleases for one or more defendants' service stations to:
>
> (a) license the use of the lessor's trademark;
>
> (b) sell only the lessor's gasoline; and
>
> (c) not sell gasoline purchased from any other source under the licensed trademark (A. 109; emphasis added).

The District Court Opinions

After further briefing and a second hearing, the district court, on December 19, 1973, denied plaintiffs' motion to certify the alleged nationwide class (A. 76-102). The court set forth the background and scope of this litigation, thoroughly analyzed plaintiffs' efforts to secure class action treatment and, based on the record which consisted of extensive affidavits, interrogatory answers

[4] The second amended *Bogosian* complaint is set forth at A. 106-11.

and deposition testimony, carefully considered the facts and demonstrated that class treatment was wholly inappropriate in these cases for numerous independently sufficient reasons. The district court expressly considered and rejected each of three possible bases for class treatment under Rule 23(b), applying the proper legal standards set forth in the Rule to the facts of these cases. The court catalogued the issues raised by plaintiffs' claims and analyzed why those issues were not susceptible of common treatment, concluding that individual questions with respect to both liability and damages predominated over common issues and that processing these cases as class actions would give rise to staggering problems of manageability (A. 76-102).

Subsequently, those defendants which had no business dealings with the plaintiffs again moved for summary judgment based on the second amended complaint's failure to allege any agreement or concerted action. The district court, noting that the deletion of the conspiracy allegations from the second amended complaint was "a matter of deliberately employed strategy" by plaintiffs' "experienced and learned attorneys in the field of antitrust litigation" (A. 59), dismissed the claims against the non-lessor defendants (A. 57-75).[5] The court's decision was based on the controlling decisions of this Court, the Third Circuit and other courts of appeals that conscious parallelism (whether or not interdependent) does not alone constitute a violation of Section 1 of the Sherman Act, and, therefore, a complaint which alleged no more than conscious parallelism does not state a Section 1 claim.

[5] The district court permitted the actions to proceed against those companies from which the plaintiffs had leased service stations, *i.e.*, Gulf in the *Bogosian* case and Exxon in *Parisi* (A. 68-73, 75).

The Court of Appeals Proceedings

In an opinion dated July 21, 1977, a divided panel of the Third Circuit (Seitz, Ch. J., and Gibbons, J.; Aldisert, J., dissenting) reversed both the denial of class certification and the decision on the sufficiency of the amended complaints (A. 1-54). The majority held that no determination of the legal sufficiency of pleadings could be made until after subjecting the trial court and the parties to lengthy discovery. Moreover, the court resuscitated the claims against petitioners while recognizing that disposition of the pending claims against the lessor defendants would render moot the claims against the non-lessors (A. 11-12).

To compound the unfairness of such a procedure, the court reversed the district court's rejection of the proposed class. The panel majority, in contravention of the in banc decisions of the Third Circuit and the decisions of several other circuits, substituted its judgment for the discretionary determinations of the district court. Thus, the court suggested that hundreds of thousands of present and former dealers throughout the country be brought into this action despite acknowledging the questionable legal sufficiency of the complaints. In so doing, the majority swept aside the insuperable problems of judicial manageability which had led the district court to deny certification and prejudged many of the complex issues raised by plaintiffs' claims—based on wholly unfounded factual assumptions. Moreover, the panel's class determination is based on an interpretation of the substantive law of tying arrangements contrary to the governing authorities of this Court, the Third Circuit and other courts of appeals by treating a buyer as having a tie-in claim even if he wished to buy both the alleged tying and tied products and was not forced to buy anything he did not want.

In light of the enormous impact of the panel majority opinion on both substantive antitrust law and the proper judicial administration of massive class action litigation and the conflicts between the majority opinion and decisions of this Court, the Third Circuit and other courts of appeals, petitioners herein moved for in banc consideration. However, because all of the active judges of the Third Circuit other than the panel had disqualified themselves from considering this matter, in banc consideration was impossible and petitioners' motion was denied by a 2 to 1 vote of the same panel which rendered the decision below (A. 56, 139).[*]

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision on the Sufficiency of the Complaints Is Contrary to Decisions of this Court and the Courts of Appeals and Leaves Uncertain the Legality of Many Types of Legitimate Business Conduct

The decision below severely jeopardizes the administration of justice in the federal courts and creates far reaching uncertainty with respect to fundamental principles of antitrust law and legitimate business conduct. Since the customary remedy of in banc consideration by the Third Circuit was unavailable in the instant case, review by this Court is necessary to resolve the conflicts between the decision below and the principles established in prior decisions of this Court, the Third Circuit and several other circuits and, in the exercise of this Court's supervisory responsibility over the administration of jus-

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[*] The recusal of the remaining circuit judges is noted on the Third Circuit's docket sheet (a copy of which is reproduced at A. 139). The reasons for this wholesale recusal are not disclosed, but presumably at least some members of the court were required to disqualify themselves under the rigid financial interest restraints imposed by 28 U.S.C. § 455.

tice in federal courts, to establish standards for the prompt resolution of legal issues in complex litigation.

A. *Deferral of Decision on the Legal Sufficiency of Plaintiffs' Theory Until After Discovery and Trial is Contrary to the Controlling Authorities and Will Result in "Jurisprudential Anarchy"*

The essential holding of the court of appeals is that the district court erred in determining the sufficiency of the second amended complaints, and that the court should have deferred ruling on the sufficiency of the conscious parallelism claims:

> We conclude that the ruling that the specific allegation of interdependent consciously parallel action made here fails to state a claim should be vacated so that the issue can be decided, if necessary, after the relevant facts are fully developed (A. 22).

Alternatively, the majority held that the mere inclusion of the term "combination" in the complaint satisfied the liberal rules of pleading (A. 18-19). However, since the only acts alleged to constitute the "combination" were the allegedly parallel leasing practices of the defendants[7] and since the court deferred ruling on the issue of whether an allegation of such parallel conduct

[7] Paragraph 16 of the second amended complaint alleges:

> The unlawful acts of defendants *as aforesaid* constitute an unreasonable combination in restraint of interstate trade and commerce in the marketing of gasoline in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (A. 110; emphasis supplied).

Paragraph 16 explicitly states that the combination therein alleged consists solely of "the unlawful acts of defendants as aforesaid." But the only "aforesaid" unlawful acts are the alleged similar, or parallel, leasing practices of the defendants. Thus, the totality of the alleged combination is the defendants' alleged "interdependent consciously parallel action," and the mere inclusion in Paragraph 16 of the statutory word "combination" does not add the crucial element of agreement necessary for a Sherman Act claim (see pp. 14-17, *infra*).

is sufficient to state a Sherman Act claim, the effect of the alternative holding is merely to defer resolution of the legal sufficiency of the complaint allegations pending discovery and, perhaps, trial.

The panel majority thus held that the *legal* sufficiency of the charges in a case involving alleged classes of hundreds of thousands of dealers of 15 oil companies cannot be decided after some six years of litigation (including two amended complaints), but must await many more years of time consuming and expensive discovery and trial proceedings. The issue here is not whether the plaintiffs can muster the evidence to prove a Section 1 violation, but whether their complaints state a cause of action. Requiring the district court to defer decision on the legal sufficiency of a complaint until after extensive undefined discovery is contrary to the scheme of the Federal Rules of Civil Procedure, misinterprets the controlling decisions of this Court and conflicts with the decisions of other circuits. Moreover, the approach adopted by the court of appeals would hamstring the effective judicial management of complex litigation by eliminating the availability of summary determination of questions of law. Finally, and most significantly, requiring parties against whom no cause of action is asserted to disclose their private files and to endure years of onerous litigation burdens would be a violation of fundamental constitutional rights.

The dissent summarizes the adverse effects of the majority approach on judicial administration as "jurisprudential anarchy":

> Although the majority purports to act in the interest of efficient judicial administration, I fail to see how that interest is served by allowing what probably will be massive discovery prior to deciding whether the basic theory of the action is legally viable. The relevant facts should be fully developed after it is

> determined whether the claim is legally sufficient, not while that issue is still in doubt. Moreover, until the theory of the case is settled, it will not be known which are the 'relevant' facts. Facts are only relevant insofar as they support a valid legal theory (A. 43).

The Federal Rules of Civil Procedure contemplate that a case be dismissed when the complaint does not set forth a legal theory which would support recovery if all of the alleged facts were proved. See Federal Rules of Civil Procedure 12(b)(6) and 56; *see generally* 2A Moore, Federal Practice ¶ 12.08. Use of these provisions enables the federal judicial system to function by eliminating claims which are insufficient as a matter of law without costly and time-consuming pretrial and trial proceedings. Again, the dissent emphasizes the need for effective use of these devices:

> A motion to dismiss or for summary judgment for failure to state a claim seeks to obviate the necessity for time-consuming and expensive discovery in cases where the facts are irrelevant because no legal claim has been stated. Requiring discovery as a predicate to deciding such a motion defeats the very purpose of the motion. . . . The question is whether an allegation of interdependent consciously parallel action states a Sherman Act claim. Either it does or it does not. That may be a sophisticated question, but it is a question of policy, not of fact (A. 43).

In requiring deferral of decision on the legal sufficiency of the complaint until the conclusion of discovery, the panel majority misapplied this Court's ruling in *Conley* v. *Gibson*, 355 U.S. 41 (1957). *Conley* held that the Federal Rules require only a short plain statement of the claim and that all supportive facts need not be pleaded, but did not abolish the requirement that a complaint state a legally cognizable cause of action.[8] The entire question here is whether a legally sufficient claim has been stated, and the panel majority in effect establishes a new rule for judging the sufficiency of pleadings in complex cases, *i.e.*, that such judgments must be deferred until after full development of the facts through discovery.

This is not a case in which the district court granted summary judgment despite the existence of factual issues or where the evidence to support the claim was in the possession of the defendant. Rather, the district court granted judgment because the sufficiency of the second amended complaint was purely a question of law. In holding this action improper, the panel majority acted in direct conflict with the decisions of other circuits, which hold that such questions, no matter how difficult, should be decided on motion. *See e.g.*, *Schwartz* v. *Campagnie General Transatlantique*, 405 F.2d 270, 273-74 (2d Cir. 1968) ("Where appropriate, a trial judge may dismiss for failure to state a cause of action upon motion for summary judgment . . . . Summary judgment procedure may be properly invoked for determination of a legal question"); *Morr* v. *United States*, 243 F.2d 913, 914 (6th Cir. 1957) ("Even if the issue involved proves to be a difficult one . . . it is nevertheless a purely legal one, not factual, and summary judgment is proper"); *Archer* v. *United States*, 217 F.2d 548 (9th Cir. 1954), *cert. denied*, 348 U.S. 953 (1955).

The instant case demonstrates the need for summary procedures and the adverse effect of the approach espoused by the court of appeals on the administration of justice and the rights of the defendants. Six years have elapsed since suit was instituted. The complaint

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[8] To the contrary, *Conley* is based on the finding that "[w]e have no doubt that [the] complaint adequately set[s] forth a claim" (355 U.S. at 48).

has been twice amended; motions have been extensively briefed and argued—all of which has burdened judicial resources and diverted the trial court from more pressing needs. Now the panel majority has dictated that a decision on the legal sufficiency of plaintiffs' complaint must await what will inevitably be several more years of expensive and time-consuming discovery, with attendant motions and judicial supervision. And, of course, at the conclusion of this process, plaintiffs' complaint will have no more or less *legal* validity than now.

The courts and commentators have become increasingly critical of the intolerable burdens on the judiciary imposed by the approach adopted by the panel majority, which Chief Judge Markey, citing the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, described as the "unhappy marriage of 'notice' pleading and virtually unlimited discovery." *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1086 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) (concurring opinion). Efficient judicial administration particularly requires the availability of summary procedures to dispose of untenable claims in complex litigation. *See* Withrow and Larm, *The "Big" Antitrust Case: 25 Years of Sisyphean Labor*, 62 Cornell L. Rev. 1, 34 (1976); Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 79, 199-211 (1976).

B. *The Controlling Decisions of this Court and the Courts of Appeals Establish that Interdependent Conscious Parallelism does not Constitute a Violation of the Sherman Act*

Since Section 1 of the Sherman Act requires a "contract, combination, or conspiracy in restraint of trade," some form of agreement or concerted action by a plurality of actors is necessary. Therefore, this Court and

others have consistently held that proof of consciously parallel conduct does not alone amount to a Section 1 offense. *See Theatre Enterprises* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954); *Naumkeag Theatres Co.* v. *New England Theatres, Inc.*, 345 F.2d 910, 911 (1st Cir.), *cert. denied*, 382 U.S. 906 (1965); *Klein* v. *American Luggage Works, Inc.*, 323 F.2d 787, 791 (3d Cir. 1963); *Winchester Theatre Co.* v. *Paramount Film Distributing Corp.*, 324 F.2d 652, 653 (1st Cir. 1963); *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); *Delaware Valley Marine Supply Co.* v. *American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962).

If proof of agreement is necessary to establish a Section 1 violation, *a fortiori*, an allegation of agreement is necessary to state a cause of action. In the face of overwhelming precedent and plaintiffs' intentional elimination of any allegation of agreement among the defendants, the panel majority held that the allegations of interdependent consciously parallel action may state a Section 1 claim.[9]

Both the reason for the prevailing rule that consciously parallel behavior (whether or not interdependent) does not constitute a violation, and the serious consequences of the panel majority's departure from these settled principles, are obvious. Virtually all business decisions are based to some extent on prior actions or anticipated reactions of competitors. Vigorous competition often results in similar actions by competitors, and the mere fact that several businessmen individually react in a similar manner to a common stimulus does not amount

[9] The inclusion of the term "interdependent" in the complaints does not distinguish this case from the controlling decisions. As explained by the dissent, the insertion adds nothing because "interdependence is implicit in the notion of conscious parallelism and . . . the added word is hardly more than a redundancy" (A. 47).

to a combination or agreement for Sherman Act purposes. *See, e.g., Orbo Theatre Corp.* v. *Lowe's, Inc.*, 156 F. Supp. 770, 775 (D.D.C. 1957), *aff'd per curiam*, 261 F.2d 380 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 943 (1959). As the dissent points out, such consciously parallel business behavior may be the essence of competition:

> In the usual situation of parallel business behavior, a businessman is conscious of what his competitor is doing and his action, or inaction, depends on what the competitor does. This is not a violation of the antitrust laws; it is, in fact, the essence of the competitive behavior that those laws seek to promote (A. 47).

Indeed, in the instant case, the allegedly consciously parallel conduct is no more than similar, but not identical, efforts by the defendants to police the use of their registered trademarks as required by the Lanham Act, 15 U.S.C. §§ 1055 *et seq.*, the Federal Trade Commission Act, 15 U.S.C. §§ 41, *et seq.* and insure compliance with over 25 state statutes prohibiting the misbranding and false labelling of gasoline at retail outlets.[10] Under the court of appeals' formulation, defendants' refusal to at-

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[10] This Court has long recognized as a fundamental proposition of trademark law:

> If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin.

FTC v. *Royal Milling Co.*, 288 U.S. 212, 216 (1933).

With respect to the Federal Trade Commission Act, the courts have long recognized the obligation of a trademark owner to control the use of his mark:

> The pertinent principles of law are clear. The owner of a trademark or tradename may not use, nor permit the use of, such trademark or tradename in a manner designed to deceive the public. Those who put into the hands of others the means by which they may mislead the public, are themselves guilty of a violation of Section 5 of the Federal Trade Commission Act.

Waltham Watch Company v. *FTC*, 318 F.2d 28, 31-32 (7th Cir.), *cert. denied*, 375 U.S. 944 (1963); *see also FTC* v. *Sinclair Refining Co.*, 261 U.S. 463 (1923); *Redd* v. *Shell Oil Co.*, 524 F.2d 1054 (10th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976); *Blue Bell Co.* v. *Frontier Refining Co.*, 213 F.2d 354 (10th Cir. 1954).

tempt to induce their competitors' customers to breach their contracts with their suppliers and to violate federal and state law could subject them to criminal antitrust sanctions.

Unfortunately, because of the wholesale recusal of the other circuit judges, the customary remedy of in banc review was not available to correct the conflicts between the panel decision and the controlling authorities. *See Windham* v. *American Brands, Inc.*, 1977-2 Trade Cas. (CCH) ¶ 61,670 (4th Cir. October 11, 1977) (in banc) (*see* discussion at pp. 23-24, *infra*). Therefore, the need for review by this Court is all the more compelling in the instant case.

II. Review of the Panel Majority's Class Determination is Required to Establish Standards for the Efficient Judicial Administration of Class Actions and to Resolve Conflicts Among the Circuits

Having stripped the district court of the ability to dismiss those defendants against whom no claim is stated, thereby subjecting them and the district court to many more years of burdensome and expensive proceedings, the court of appeals proceeded to expand the case many times over by reversing the district court's careful and fully supported class action determinations.

A. *The Court of Appeals' Decision Constitute a Wholly Unauthorized Invasion of the District Court's Discretion to Supervise Class Action Litigation*

Several courts of appeals, including prior in banc decisions of the Third Circuit, have recognized the need for deferring to the discretion of the district court on class action determinations. In *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974), the Third Circuit in banc limited review on the issue of predominance of common questions to whether the district court properly identified the issues raised by the claims and those issues which are common to the class members. Once the district court has done so, the court of appeals must defer since the issue of predominance "relates to the conservation of litigation effort, and the trial court's judgment probably will be as good as ours" (496 F.2d at 756). With respect to the superiority of the proposed action, *Katz* required deference to the district court's discretion so long as the court had considered and compared the fairness and efficiency of the alternative methods of adjudicating the controversy (*Id.*, at 759).[11] In *Link* v. *Mercedes-Benz of North America, Inc.*, 550 F.2d 860 (3d Cir.), *cert. denied*, 97 S.Ct. 2641 (1977), the Third Circuit in banc reaffirmed *Katz*, noting that the trial judge as "the man on the scene" is far better equipped to evaluate the practical problems posed by massive class actions (550 F.2d at 864).

The principles established in *Katz* and *Link* have been adopted by several other circuits. *See New York* v. *International Pipe and Ceramics Corp.*, 410 F.2d 295, 298 (2d Cir. 1969) (judgment of trial court to be given

[11] The impact of the wholesale recusal of the Third Circuit judges in this case is demonstrated by the fact that four of the five judges who recused themselves were part of the *Katz* majority. The fifth, Judge Adams, went further and argued in his dissent that the majority did not pay sufficient deference to the trial courts' "generous discretion" (496 F.2d at 775).

"broadest discretion" and "greatest respect"); *Shumate & Co.* v. *NASD*, 509 F.2d 147, 155 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975) ("District Court's decision is reviewable only for an abuse of discretion"); *Livesay* v. *Punta Gorda Isles, Inc.*, 550 F.2d 1106, 1110 (8th Cir. 1977) (district court decision "reviewable only for an abuse of discretion"); *Price* v. *Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9th Cir. 1974) ("class action determination under Fed. R. Civ. P. 23 is one of a trial courts' considered discretion"); *Peterson* v. *Oklahoma City Housing Authority*, 545 F.2d 1270 (10th Cir. 1976) ("question . . . is one primarily for the determination of the trial judge").

The de novo class determination by the panel majority here is directly contrary to these cases. As noted by the dissent, the majority's citation of purportedly common issues is merely "a euphemistic way" of disagreeing with the district court's structuring of the proof—a matter which "lies necessarily and unalterably within the discretion of the district court" (A. 50). For example, while recognizing that the contracts in issue do not, on their face, require the exclusive sale of the lessor's gasoline, the majority identifies as common the issue of whether the "practical economic effect" of the lease provisions utilized by the defendants, when read together, amount to the alleged tie-in (A. 32-33). Based on factual assumptions which were totally unsupported by the record, the majority suggests the "practical economic effect" can be shown on a uniform basis for each of the hundreds of thousands of present and former dealers of the fifteen defendants. This finding overlooks numerous complex individual issues which led the district court to reject the proposed class, including:

(1) The significant variations among the over 400 forms of leases and contracts utilized by the defendants, which are subject to further negotiations with individual

dealers. The majority describes allegedly common lease provisions which presumably give rise to the "practical economic effect" (A. 32). However, many of the provisions are not common to the leases utilized by the defendants, and such significant variations led the district court to find that analysis of the economic effect of defendants' varied contracts would raise individual issues (A. 95);

(2) The location of the station and its sales volume, which have a direct impact on the "practical economic effect" of lease provisions on the individual dealers; and

(3) The interest of the individual dealers in purchasing from a source other than his lessor.

The dissent succinctly summarizes the error of the majority's assumptions:

> Even if there were only one defendant oil company and only one form contract, the practical economic effect would vary from dealer to dealer, city to city, region to region. It might, for example, be economically feasible for a large volume dealer in a large city to install his own pumps and tanks while it might not be feasible for a smaller dealer in a smaller city to do so. Here there are more than a dozen oil companies, with operations concentrated in different regions of the country, and there are more than 400 different forms of contracts and agreements. *A fortiori*, the practical economic effects of the agreements will present diverse questions (A. 50-51).

Similarly, the panel majority reversed the district court's finding that proof of sufficient economic power over the tying product, *i.e.*, service station sites available for lease, would require an individual determination by location, or at least by geographic market. The court of appeals relied on the assumptions that defendants control a majority of the existing service stations and that zoning restrictions and high capital costs re-

strict new development (A. 35-36). This unprecedented intrusion into the fact-finding province of the district court is unsupported by the record and defies common sense by ignoring the significant variations in zoning restrictions, capital costs and defendants' market shares among the thousand of diverse markets encompassed within the alleged nationwide class. Obviously, whatever the situation may be elsewhere, if there were other stations (or sites suitable for station use) available to a dealer in his area, his decision to lease from a defendant does not give him an antitrust claim. *See Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 7 (1958).

With respect to the issues of the fact and amount of damages, the panel majority speculates that damages ultimately might be proved by calculating a per unit overcharge resulting from the alleged practices as in a horizontal price fixing case brought by consumers (A. 38-40). This finding ignores the requirement that a purchaser seeking damages for an alleged tie-in must show that he was forced to purchase a product at a price higher than he otherwise would have paid for a comparable product in order to demonstrate impact or fact of damage. *See Gray* v. *Shell Oil Co.*, 469 F.2d 742, 751 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); *Plekowski* v. *Ralston Purina Co.*, 68 F.R.D. 443 (M.D. Ga. 1975); *see generally* Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127 (1976). The court's damage formulation also ignores the necessity of setting off against the alleged overcharge the value of the use of the defendants' trademarks and other services provided. *See United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 618 (1977); *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43, 52 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *Ungar* v. *Dunkin' Donuts of America, Inc.*, *supra*, 531 F.2d 1211, 1223 (3d Cir.), *cert. denied*, 429 U.S. 823 (1973). These calculations will vary by brand, geographic area and

individual dealer, and could far exceed any overcharge, thereby resulting in no impact or fact of damage. *See United States Steel Corp.* v. *Fortner Enterprises, Inc., supra;* Areeda, *Antitrust Analysis* ¶ 554 at 617 (2d ed. 1974).

Finally, with respect to the issue of superiority of the class action device and the peculiarly discretionary issue of manageability of the proposed class action, the majority summarily disregards the district court's detailed analysis of both the relative fairness and efficiency of alternative methods of adjudication and the criteria set forth in Rule 23(b)(3) (A. 90-102), and states only that it disagrees completely with each of the district court's findings (A. 40-41). The court noted only that problems of notifying class members could be overcome by use of defendants' regular mailings to their dealers—a procedure which would violate due process and which was suggested by Justice Douglas in his dissent in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 180 n.1 (1974), but rejected by the *Eisen* Court.

Although, as noted above, several courts of appeals, including prior in banc decisions of the Third Circuit, recognize the need for deferring to the discretion of the district court on these questions, the instant case demonstrates the need for a definitive ruling by this Court to establish quidelines for the proper administration of class actions. *See Recent Developments*, 62 Cornell L. Rev. 177, 184 (1977). Moreover, review by this Court is compelled in the instant case because the recusal of all of the remaining circuit judges effectively eliminated petitioners' right to seek reconciliation of the panel majority's opinion with the controlling precedent. *See generally, Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 261 (1953).

The experience of the Fourth Circuit illustrates the need for review of the instant case. In *Windham* v. *American Brands, Inc.*, 539 F.2d 1016 (4th Cir. 1976), the panel majority as here substituted its findings for the district court's and reversed a denial of class certification. As here, the court relied in part on its finding that a bifurcated trial on the issues of liability and damages would be appropriate.[13]

Unlike the instant case, the remedy of rehearing in banc was available to reestablish the necessary discretion of the district court. In *Windham* v. *American Brands, Inc.*, 1977-2 Trade Cas. (CCH) ¶ 61,670 (4th Cir., Oct. 11, 1977) (in banc), the full court noted that the district court's denial of class treatment was based on a finding of unmanageability and recognized:

> the firmly established principle that the issue of manageability of a proposed class action is always a matter of 'justifiable and serious' concern for the trial court and peculiarly within its discretion. This is so because the issue is one of fact, subject to determination by the district court; it is 'a practical problem, and primarily a factual one with which a district court generally has a greater familiarity and expertise than does a court of appeals. Consequently, it is an area in which the trial court must of necessity be granted a wide range of discretion.' (*quoting Link* v. *Mercedes-Benz, supra*). (*Id.* at 72,748; footnotes omitted.)

With these principles in mind, a 7 to 1 majority of the in banc court reversed the panel decision, emphasizing that it would not disturb the trial court's findings (similar to those of the district court here) that the individual issues raised by the necessity of proving the three elements of an antitrust cause of action made the action unmanageable. The court specifically rejected the panel's

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[13] The court below relied on the panel decision in *Windham* in suggesting such a procedure (A. 39).

directive to bifurcate the trial of the issue of violation from impact and damages, noting that although the *Bogosian* majority had approved such a technique, "[t]he reasoning in Judge Aldisert's dissenting opinion [is] more persuasive." (*Id.* at 72,752, n. 35a).

Here, as in *Windham*, the panel majority exceeded the proper role in the administration of class actions and trampled on the broad discretion which must be afforded the district court, establishing principles in conflict with those of the other circuits. However, in *Windham* in banc review by the Court of Appeals was available to reestablish the proper rule of law. The wholesale recusal of the Third Circuit judges eliminates such a remedy here and requires review by this Court.

B. *The Panel Majority's Class Determination is Based on Substantive Antitrust Principles Which Are Contrary to Decisions of this Court and the Courts of Appeals*

The district court held that proof of plaintiffs' tie-in claims "would require a factual determination in each and every lease that there was such economic coercion as to constitute an illegal tie-in arrangement" (A. 95). Because such a determination would require an individual inquiry with respect to each class member, the court found class action treatment inappropriate.

The panel's reversal is based on principles of the substantive law of tying arrangements directly contrary to the prior decisions of this Court, the Third Circuit and several other court of appeals. First, both the district court and the court of appeals recognized that the multiple contracts utilized by the defendants did *not* contain any express requirement that lessee dealers purchase gasoline exclusively from their lessors (A. 32, 94). However, the court of appeals proceeded to analyze the problems of proof raised by plaintiffs' claims as if the contracts in question did contain express tie-in clauses.

Second, the panel majority held that no proof of coercion is necessary to sustain a tie-in claim by a purchaser where there is a written contract, the alleged practical effect of which is to induce the purchase of both the alleged tying and tied products (A. 33).

While correctly noting that the essence of an unlawful tie-in is a seller who conditions the sale of one product on the purchase of another, the panel majority failed to recognize that in a damage action brought by a purchaser (as opposed to a competitor or a government prosecution) proof of such "conditioning" necessarily requires a showing that the buyer did not willingly seek to purchase both products, but was required to purchase the tied product as a condition to obtaining the tying product. Thus, the effect of the courts' ruling is to convert any contract, or in this case two contracts,[13] providing for the sale of two or more products into a Sherman Act violation.

This Court has recognized that the essence of an unlawful tie-in is the use by the seller of its economic power in the tying market to coerce or compel the purchase of the tied product. For example, in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614 (1953), the Court held that the "common core of the adjudicated unlawful tying arrangements is the *forced* purchase of a second, distinct commodity with the desired purchase of a dominant 'tying' product" (emphasis added). See also *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 6 (1958) (in a tying ar-

[13] The allegations here relate to leases of real estate, which did not provide for the purchase of gasoline, and separate contracts to supply gasoline, which in many instances (*e.g.*, Mr. Parisi) were manifested only by a course of dealing, and which did not relate to the leasing of real estate.

rangement, buyers are "forced to forego their free choice between competing products"); *United States* v. *Loew's, Inc.*, 371 U.S. 38, 45 (1962) (noting the "force" that had been applied to purchasers of the tied product); *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 504 (1969) (describing the purchasers as having been "forced" to accept the tied product).

Even where there exists a written contract calling for the purchase of both the alleged tying and tied product, this is not dispositive of the issues of illegal tying. In *Capital Temporaries, Inc.* v. *Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974), the plaintiff alleged that in order to obtain a license to use the defendant's trademark and operate a white collar temporary personnel franchise, it was also required to license and operate a blue collar personnel franchise. The parties had entered into a written contract, which the court assumed obligated the plaintiff to operate both types of franchises. Noting that there was no evidence that the plaintiff had been coerced, had tried to avoid the requirement of operating the blue collar franchise or had sought to operate only the white collar business, the court affirmed the dismissal of the tie-in claim:

> We do not think that there can be any question that no tying arrangement can possibly exist unless the person aggrieved can establish that he has been required to purchase something which he does not want to take.
>
> * * * *
>
> It does not follow that because the contract required the opening of a blue collar operation, it was therefore a tying arrangement. Quite obviously, a franchise agreement, like any contract of sale may obligate the purchaser to accept numerous commodities, trademarked or not; this does not mean that the purchaser was coerced in any fashion to take some or all to get one or some (506 F.2d at 662, 665-66).

See also *American Manufacturers Mutual Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1137 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972) ("[T]here can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice").

Capital Temporaries was followed by the Third Circuit in *Ungar* v. *Dunkin' Donuts of America, Inc.*, 531 F.2d 1211 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976). After reviewing *Northern Pacific*, *Fortner* and *Lowe's*, *supra*, the *Ungar* court concluded:

> In view of these teachings, we simply cannot accept the district court's view that the Supreme Court has not set forth a coercion requirement in tying cases.
>
> * * * *
>
> We believe that coercion has been and continues to be an integral part of the law of tying as established by the Supreme Court. (531 F.2d at 1219, 1222)

While the alleged tie-in in *Ungar* was not based on the practical economic effects of written contracts, the Third Circuit's holding on coercion is equally applicable in such a case:

> We believe that coercion is implicit—both logically and linguistically—in the concept of leverage upon which the illegality of tying is premised: the seller with market power in one market uses that power as a 'lever' to force acceptance of his product in another market. *If the product in the second market would be accepted anyway, because of its own merit, then, of course, no leverage is involved;* in the language of the District Court, there is no use of the sellers' market power (531 F.2d at 1218; emphasis supplied).

Moreover, the decision below is entirely inconsistent with the *Ungar* court's statements that "what is sufficient to coerce one buyer's choice may not be sufficient to coerce another buyer's choice," and therefore "[p]roof of a tie-in must focus on the buyer, because a voluntary purchase of two products is simply not a tie-in" (*Id.* at 1219, 1224).[14] In the face of these statements, the panel majority found *Ungar* was distinguishable merely because alleged tie-in here is based on the practical economic effect of the contracts utilized by the defendants.

This case is not rationally distinguishable from *Ungar*. As the district court recently stated in another case, "I have great difficulty in reconciling *Ungar* v. *Dunkin' Donuts of America, Inc.*, 531 F.2d 1211 (3d Cir. 1976), and *Bogosian, supra*, as to certain aspects of when class certification is appropriate and when it is not . . . ." *Aamco Automatic Transmissions, Inc.* v. *Tayloe*, 1977-2 Trade Cas. (CCH) ¶ 61,681 (E.D. Pa. 1977). However, since no in banc review to resolve the conflict was possible, review by this Court is necessary.

Since the essence of an unlawful tie-in is the use of economic power to force a purchaser to accept an unwanted product, the voluntary purchase of two products from a supplier is plainly not unlawful. The decision below, however, would render unlawful such a voluntary

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[14] See also, *Plekowski* v. *Ralston Purina Co.*, 68 F.R.D. 443 (M.D. Ga. 1975); *Hehir* v. *Shell Oil Co.*, 72 F.R.D. 18 (D. Mass. 1976). However, there is some apparent confusion among some courts with respect to this principle. *See Siegel* v. *Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967), *modified sub nom, Chicken Delight, Inc.* v. *Harris*, 412 F.2d 830 (9th Cir. 1969), *on remand*, 311 F. Supp. 847 (N.D. Cal. 1970), *aff'd in part and rev'd in part*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *In re 7-Eleven Franchise Antitrust Litigation*, 1972 Trade Cas. (CCH) ¶ 92,829 (N.D. Cal. 1972); *Esposito* v. *Mister Softee, Inc.*, 1976-1 Trade Cas. (CCH) ¶ 68,866 (E.D.N.Y. 1976); *see generally*, Varner, *Voluntary Ties and the Sherman Act*, 50 So.Cal.L.Rev. 271 (1977).

agreement solely on the fortuitous grounds that it is either incorporated in written contracts or is the practical economic effect of a written contract. This cannot be justified—either in economic theory or logic—and review by this Court is necessary to resolve the conflicting decisions of the lower courts on this issue.

CONCLUSION

The petition for writ of certiorari should be granted.

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